IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13-3-2002

CORAM:

THE HON'BLE MR. JUSTICE K. SAMPATH

C.R.P.No.2352 of 2001 and C.M.P.No.12528 of 2001

1.Saraswathy
W/o Pulavar R. Palanisamy.

2.Pulavar R. Palanisamy
S/o Raju Chettiar,
No.4, New Dabir Street,
Kumbakonam, Tanjore District. ... Petitioners

Vs.

Viswanathan S/o Muthusamy,
No.91, Kasiraman Street,
Kumbakonam, Tanjore District. ... Respondent

For Petitioners: ... Mr.D. Rajendran
For Respondent: ... Mr.N. Vanchinathan

This civil revision petition is filed under Section 115 of the Code of Civil Procedure against the fair and decretal order dated 3-4-200 1 made in I.A.No.78/2001 in O.S.No.65/2001 on the file of the learned Principal Subordinate Judge, Kumbakonam.

: ORDER

By consent the main revision petition itself is taken up.

2. The civil revision petition is filed against the order of dismissal of the prayer for the appointment of an Advocate Commissioner to visit the suit property, note down the physical features, besides the age, stage and measurement of the new construction in B Schedule property and submit a report, by the learned Principal Subordinate Judge, Kumbakonam, made on 3-4-2001 in I.A.No.78/2001 in O.S.No.65/2001 on his file.

3. The suit itself has been filed for permanent injunction restraining the defendant, his men, servants, agents, etc. from in any manner interfering with the easementary right of light and air to A Schedule School Buildings by making any offending constructions in the B Schedule site or by making any further constructions and for a mandatory injunction for removal of

the offending constructions in B Schedule site, which are affecting or interfering with the easementary right of light and air to A Schedule School Buildings.

4. The plaintiffs are the revision petitioners. The first plaintiff is the Secretary and Correspondent of Sri Krishna Aided Primary School and Saraswathi English Medium School and Principal of Sri Krishna Girls High School and the second plaintiff is the Secretary and Correspondent of Sri Krishna Girls High School, all of which are run in the A Schedule site for over several decades. The defendant purchased the site described in B Schedule on 6-11-2000. From 1953 to 1989 Sri Krishna Aided Primary School was in thatched building with brick walls. On the southern wall in T.S.No.762-B and on the eastern wall formerly in T.S.No.761, now in T.S.No.761-B a number of windows are there, through which light and air are received from B Schedule suit site to the School Buildings. There was uninterrupted enjoyment of light and air from B Schedule site from 1953 till 1989. Prescriptive easementary right had thus been acquired.
In 1989 the first plaintiff constructed a double storeyed School Building in T.S.No.762-B and T.S.No.761-B and on the southern wall there were windows in T.S.No.761-B, through which light and air have been continuously and peacefully enjoyed by the School Buildings. The defendant and his predecessors in title have also acquiesced in the said peaceful enjoyment from 1953. The defendant attempted to construct a wall in B Schedule site on 28-2-2001 and thereby interfered with the light and air to the plaintiffs' School Buildings. The second plaintiff objected to the same. The defendant preferred a complaint before Kumbakonam Town Police Station (East). He agreed to construct in B Schedule site without affecting and interfering with the free flow of light and air through the windows to the A Schedule School Buildings in suit A Schedule property. Notwithstanding his assurance, he had been hurriedly constructing the wall to some height day and night on the northern side in the B Schedule site near the southern wall in the A Schedule item 1 School Buildings in T.S.No.762-B in order to obstruct the free flow of air and light through the windows in the said School Buildings southern wall in spite of the objections of the plaintiffs. The students will have to undergo health hazard in view of the construction of the wall by the defendant. In those circumstances, the suit had been filed. Pending suit the present application as also another application for injunction were taken out.

5. In the affidavit in support of the application for appointment of Advocate Commissioner, it is stated that the physical features of the suit property had to be noted, besides the age and stage of the new construction.
6.In the counter filed by the defendant, the various allegations are denied and it is stated that only because the second plaintiff gave trouble, the defendant had to file a police complaint and the police rightly directed the second plaintiff not to give any trouble to the defendant. The defendant never agreed before the police that he would make construction without affecting the plaintiffs' right to free flow of air and light through the windows of the School Buildings. The plaintiffs have no right to air and light. There is no hurried construction. There is no need

for appointment of an Advocate Commissioner. There is no dispute regarding the identity of the property. The defendant is not denying the construction work. He is making construction only in accordance with the plan sanctioned by the Municipality, that too leaving 2 feet, away from the wall of the School Buildings. No Commissioner can be appointed in an injunction suit to note physical features, when the same can be proved by oral evidence as laid down in KALPANA AND ANOTHER VS. L. KALIANNAN (1998(1) LW 85). When possession is admitted, there is no necessity to note down the physical features as laid down in R. SATYANARAYANA RAO AND THREE OTHERS VS. M.K. MANOHARAN @ K. MANOHARAN AND ANOTHER (2000(3) LW 787).

7. The learned Subordinate Judge dismissed the application for appointment of Advocate Commissioner as also the other application for injunction retraining the defendant from putting up any construction, pending disposal of the suit. Against the order dismissing the application for injunction, the plaintiffs filed a revision and the same was dismissed by this Court. Against the order dismissing the application for appointment of Advocate Commissioner, the present revision petition has been filed.
8. The learned Subordinate Judge, while dealing with the question of appointment of Advocate Commissioner, has said that with regard to the identity of the properties, there is no dispute between the parties, that there was equally no dispute that the defendant was putting up construction only in his property and no case was made out for the appointment of Advocate Commissioner. The learned Judge relied on the judgments of this Court in KALPANA AND ANOTHER VS. L. KALIANNAN (1 998-I LW 85) and R. SATYANARAYANA RAO AND THREE OTHERS VS. M.K. MANOHARAN @ K. MANOHARAN AND ANOTHER (2000(3) LW 787) for coming to that conclusion.

9. In my view, the reasoning of the learned Judge cannot be accepted. Merely because there is no dispute with regard to the identity of the property, it does not mean that no case is made out for the appointment of an Advocate Commissioner. The question is whether the defendant is putting up the construction in his property as per the plan sanctioned by the Municipality. Equally, the further question would be as to whether the plaintiffs themselves have put up construction as per any sanctioned plan in their property, for which purpose a visit by the Advocate Commissioner to note down the physical features and take measurements on the basis of the rival documents would be necessary and it would eliminate any detailed oral evidence.

10. In PILLAIYAR VS. GANESAN AND ANOTHER (1999 MLJ (Supp.) 432) I had occasion to consider the grounds for invoking Order 26 Rule 9 of the Code of Civil Procedure for the appointment of an Advocate Commissioner. No doubt, there can be no appointment of Commissioner for collecting evidence or gathering materials. However, the object of a Commission under Order 26 Rule 9 of the Code of Civil Procedure is not to collect evidence, which has to be done only by the Court, but for elucidating matters which are local in character, which can be done only by local investigation at the spot.

11. In my view, a local investigation is requisite and proper

and the lower Court was in error in declining to appoint an Advocate Commissioner. Absolutely no prejudice would be caused by the appointment of an Advocate Commissioner.

12. In PONNUSAMY VS. SALEM VAIYAPPAMALAI JANGAMAR SANGAM (1985(1) MLJ 380 = AIR 1986 Madras 33), the appointment of an Advocate commissioner was sought for by the defendant in a suit for injunction to restrain him from digging foundation in the plaintiff's land. The defendant contended that the land belonged to him. The Court refused to issue Commission. NAINAR SUNDARAM, J. (as the learned Judge then was) interfered with in revision and granted the prayer on the following reasoning:

"A controversy, as we would see from the pleadings, has arisen as to whether the constructions put up by the third defendant are within his land or whether they have encroached into the lands of the plaintiff. A local investigation is the best way to find out the position and the party, viz., the third defendant coveting the evidence to place before the Court through local investigation by the Commissioner cannot be shut out of their right."

13. In APPU VS. A. FATIMA ZOHRA AND ANOTHER (96 LW 369 =1982 TLNJ 4 82) it has been held by this Court that,

"there may be very many circumstances in which only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the building, could alone assist Courts to decide correctly. If such prompt actions are not taken, it may destroy the valuable right of the parties. It may so happen, when a landlord highhandedly starts pulling down a portion of the main building, the tenant would be greatly interested in securing a Commissioner appointed forthwith. If the right of the tenant to have access to staircase is constructed, he is most interested in seeking appointment of the Commissioner and secure immediate relief for restoring amenities, which is assured to him under the Act."

14. As already pointed out, absolutely no prejudice would be caused by the appointment of an Advocate Commissioner for the purpose of inspecting the property and submitting his report on the physical features, measurements etc. Though the Commissioner cannot decide the dispute, his inspection and report would help the Court in deciding the dispute. The two decisions relied on by the lower Court do not apply to the facts of the present case.

15. In view of the discussion above, the civil revision petition is allowed. The lower Court shall appoint an Advocate Commissioner for the purpose set out in the petition in support of the application for appointment of an Advocate Commissioner. The Advocate Commissioner shall measure the properties of both the parties and also note down whether there are projections of the sunshades over the plaintiffs' School Buildings on the defendant's property. The Commissioner shall also note down the age of the buildings of the plaintiffs and submit his report. The parties shall file copies of their respective title deeds and also the plans from the Municipality to enable the Commissioner to inspect and file a proper report.

There will be no order as to costs. The stay petition in C.M.P.No.12528/2001 is closed.

13-3-2002
Index: Yes
IGP

To
The Principal Subordinate Judge,
Kumbakonam.

K. SAMPATH, J.

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and
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